IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

No. ——

WILLIAM A. WRIGHT, APPELLANT,
PETITIONER FOR CERTIORARI,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEES,
RESPONDENTS.

Petition for issuance of the Writ of Certiorari.

Response of Appellees, Respondents, to the application of Appellant, Petitioner, for the writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the above-stated case.

In response to the petition for the issuance of the *writ of certiorari* in the above-stated case, and for cause why the said petition should not be granted, the above-named Appellees, Respondents, say:

1st. That said case was, as shown by the petition for the *writ of certiorari*, argued in May, 1902, and was decided by the Circuit Court of Appeals on October 13, 1902. That no application was made for any rehearing in said cause, in or to said Circuit Court of Appeals, nor is any reason shown why such application was not so made.

2d. That the petition for certiorari shows that it is claimed in said case that the stock in question has been subject to taxation ever since it was issued in the year 1882. It is claimed that by the Constitution of Georgia, adopted in 1877, all such stock was rendered taxable, and any exemption forbidden. It

is also shown that since 1882 this stock has been in the same possession and category in which it now is. That at no time since 1877 or 1882 until May, 1901, was any demand ever made by the Comptroller-General, or any one else, for the payment of taxes upon said shares of stock.

3d. That the petition for certiorari and the record show that the claim of the appellees in this case does not involve the power of the State of Georgia by appropriate legislation to tax shares of stock, but merely whether under her existing Constitution and laws she does tax shares of stock which represent fixed properties, or whether she regards them as mere representatives of such properties and as not being separate taxable property. That at the time of the adoption of the Constitution of Georgia in 1877, the status of stock corporations owning railroads, and of stocks of foreign railroad corporations, had been settled by the decisions of the Supreme Court of Georgia.

In the case of *Wright, Comptroller-General, vs. Southwestern Railroad Company*, it was insisted that the Railroad Company should return and pay taxes on certain railroad stocks owned by it. The record of file in the Supreme Court of Georgia shows that such taxes were demanded upon certain *shares* of its own stock, and also upon shares in other railroad companies, including some stock in a railroad company of Alabama. The Court held the stock not taxable, saying:

> "(*a*) Stock in the company's own road, held by itself, "or in other roads in this State, whose charters limit or "exempt taxation thereon, and whose income is taxed, "is not liable; and stock held by the company in rail- "roads without the limits of this State is not taxable here. "Stock in a railroad is really but so many shares of its "property, and that property is real estate, for the most "part, at least, and taxable by the State in which the "road is located."
>
> "(*b*) But bonds, notes and all other mere evidences "of the debt follow the *situs* of the creditor, no matter "where the debtor lives."
>
> *Wright, Comptroller-General, vs. Railroad Co.*, 64 *Ga.* 783, 799.

This decision was rendered by three Judges (the full bench) and has never been reversed by the Supreme Court.

The law, in force in Georgia since the year 1858, declares as to a decision by a full bench:

> "A decision concurred in by three Judges can not be "reversed or materially changed, except by a full bench, "and then after argument had, in which the decision, by "permission of the Court, is expressly questioned and "reviewed; and after such argument, the Court in its "decision shall state distinctly whether it affirms, re- "verses or changes such decision."
>
> *Civil Code of* 1895, *Sec.* 5588. *Code of* 1882, *Sec.* 217.

This decision does not rest upon any *exemption* granted by the State, but rules that the stock is not taxable property, but only a representation. It declares the status of stock for taxable purposes.

4th. The later decisions in Georgia are in accord with this.

There has been no other decision on this point, but in a case where the Legislature by statute had directed that Building and Loan Associations should pay a tax on the market value of the shares of their members on which no loans had been made, in lieu of all other taxes (except a license tax). The court in holding this unconstitutional, as in effect exempting a part of the assets of the corporation from taxation, say concerning the right of the Legislature to refuse to tax both the property of the corporation and the shares of the stockholders, as involving double taxation:

> "There are, in general, four methods of taxing corpo- "rate interests. These are: 1st, by a tax on the fran- "chise; 2d, on the capital stock; 3d, on the real estate "and personal property of the corporation; 4th, by a "tax on the shares of stock in the hands of the stock- "holders. *I. Cook on Stock etc.* (*3d ed.*), *Sec.* 561. See "also, *II. Redf. Rwy.*, 453, and authorities cited. It is "not incumbent on the taxing power to impose a tax on "each, but it may do so; and while, as a rule, double tax- "ation is properly not favored, whether it will be im- "posed or not rests with the taxing power—originally

"the Legislature. The decision in *Mayor of Macon vs. "Macon Construction Co.*, 94 *Ga.* 201, is not in conflict "with the doctrine here announced."

Georgia B. & L. Asso. vs. Savannah, 109 *Ga.* 63, 70-1.

Also, in another like case the Supreme Court of Georgia quotes with approval the language of a Superior Court Judge, as follows:

"Possibly it may be competent to provide against tax- "ing the shares of stock where all the property which "gives them value has been taxed. I do not decide as "to this, because it is not before me directly. But in this "case, the act provides in terms, not for relieving share- "holders against what might be claimed to be double tax- "ation, if the company had paid on everything conferring "value on the share; but, on the contrary, it provides for "the company to pay only on the market value, not of "its property, but of shares belonging to certain of its "stockholders on which no loans have been made."

Atlanta National Assn. vs. Stewart, 109 *Ga.* 80, 98.

5th. It was conceded by counsel for Appellant that shares of domestic railroad companies are not taxed, and that they ought not to be taxed. (Transcript, pp. 14, 22).

The opinion of the Court below says:

"It is conceded by counsel for the Comptroller-General "that the State has not attempted to tax shares in do- "mestic corporations, and that it would be wrong to do "so."

Transcript of Record, p. 19.

This can only be because railroad shares are not, for taxing purposes, property, but mere *evidences of title* to the property in the hands of the *corporation*, and that the property *alone* is the taxable thing.

To hold otherwise would be to convict the government of the State of having violated its Constitution for over twenty-four years in not collecting taxes on railroad shares.

It would convict the Legislature of violating the Constitution in providing against the taxation of shares in domestic corpora-

tions with fixed assets,—which companies return all of their property for taxation. Yet it is conceded that such shares are not taxed.

If shares are property, and can not be regarded as mere symbols of interest in the corporate property, and as such not bound to be separately taxed, then domestic shares *must* be taxed.

> "Property of all kinds is by a proper interpretation "of our statute (Constitution) placed in one class as a "subject of taxation—and not only so, but taxation shall "be uniform on all property subject to be taxed."
>
> *Georgia B. & L. Asso. vs. Savannah,* 109 *Ga.* 63, 67.

This very decision later recognizes that shares of stock can be treated, not as exempt, but where the corporate assets are fully taxed, as mere certificates of an interest therein, and non-taxable.

Ibid, pp. 70-71.

If shares representing an interest in corporate property in Georgia are mere certificates of such interest, and non-taxable *as not being property for taxing purposes,* how can like shares representing like interests in property not in Georgia, but in Alabama, be regarded as property and be taxed without violating the provisions of Georgia's Constitution as to uniformity?

Surely it would take very express legislation to declare that a railroad share held by a Georgian in a Georgia Railroad Company *is not property* in Georgia, because a mere representative of fixed property—but a railroad share in an Alabama Railroad Company, although a mere representative of an interest in an Alabama corporation and in a railroad in Alabama, is property in Georgia.

Especially it should take the clearest mandate of the law to override the declaration of Georgia's own Supreme Court.

> "Stock held by the Company in railroads without the "limits of this State is not taxable here. Stock in a rail- "road is really but so many shares of its property, and "that property is real estate for the most part at least, and "taxable by the State in which the road is located."
>
> *Wright, Comptroller-General, vs. Southwestern R. R. Co.,* 64 *Ga.* 783.

6th. In response to the statutes claimed by Appellant to show a purpose to tax shares of foreign railroad stock, we say:

(a) As to the questions in the Act of 1898 cited. An inquiry is not the levy of a tax. It seeks for information,—it does not say the property is taxed, or seek to overturn the decision in

Wright, Comptroller-General, vs. Southwestern R. R. Co., 64 *Ga.* 783.

All presumptions are against such taxation.

See Judge Newman's opinion, Transcript of Record, p. 18.

Desty on Taxation, p. 199 *(Sec.* 39*).*

Cooley on Taxation, p. 165.

Cook on Stock, etc. (3d ed.), Secs. 561, 567.

Endlich on Interp. of Stat., Sec. 345.

Cook is cited by the Supreme Court of Georgia on this subject.

Ga. B. & L. Asso. vs. Savannah, 109 *Ga.* 63, 71.

(b) If the question 30 is to be taken as an absolute legislative declaration that shares of foreign railroad stocks must be taxed, then question 33 must be taken as a like declaration that domestic railroad shares are not to be taxed.

If railroad shares are property, then this is an unconstitutional exemption of domestic railroad shares.

If domestic railroad shares are not property, but mere evidence of title to an interest in the corporate property in the hands of the corporation,—then foreign railroad shares are the same, and equally *non-taxable.*

Construed in the first way, the Legislature has passed an unconstitutional Act exempting property.

109 *Ga.* 63, 67.

109 *Ga.* 80, 97.

Such a construction can not be had if any other can be found.

Park vs. Candler, 113 *Ga.* 647.

If the first question (30) be considered as calling for the information as to foreign shares that the Tax-Receiver may ascertain whether there be any which come within the class of those corporations which do not pay taxes on the property representing the value of such shares, and as intended to elicit, as to foreign shares, the information sought by Section 53 as to domestic shares, then the questions do not involve any conflict with the Constitution, and equally recognize that under the laws of Georgia shares representing interests in fixed corporate property which is taxed where located, are not separate taxable property in Georgia as declared in

64 *Ga.* 783.

The citation of Section 16, Par. 30-1-2 of the Act of 1898, as to what the agent of a non-resident should return for taxation, because it enumerates *stocks inter alia* as property to be returned for taxation, does not help the contention of Appellant.

This means *such stocks* as a resident would have to pay on. It does not intend to tax *all* stocks. Stocks representing interests in fixed properties were not being aimed at. If so, why are not domestic railroads and factory stocks taxed? It is admitted that they are not, and should not be, because *not taxable property.*

Appellant has also cited the second section of the Act passed by the Georgia Legislature at the session of 1884-5, which he claims indicates the intention of the Legislature to make stock of railroad companies incorporated without the State of Georgia, but held by citizens within the State, liable to taxation, when shares in like corporations created by the State of Georgia are recognized as non-taxable.

We submit that the act not only does nothing of the sort, but that it furnishes evidence:

First. Of a purpose to put all shares of stock, whether in corporations created by Georgia or by other States, upon the same footing.

Second. That it shows no intention to enlarge the class of shares of stock which were formerly subject to taxation under the previous decisions of the Supreme Court of Georgia; and,

Third. That its true significance is only to require the return for taxation *on a parity*, of such shares of capital stock in do-

mestic or foreign corporations as are not the representations of property elsewhere and otherwise taxed.

First. This section of the Act provides that

> "personal property shall be construed for the purposes of
> "taxation to include all goods * * * all stocks and
> "securities, whether in corporations within this State or
> "in other States, owned by citizens of this State, etc."

Distinguished counsel for Appellant says that is declaratory of the general policy of the State, and of the legislative intent that all personal property shall be construed to include for purposes of taxation all "*stock in foreign corporations*" owned by citizens of this State.

We insist that it is *expressly declaratory that all stocks and securities of corporations in this State, or in any other States, stand upon exact equality of treatment*, to wit: that such as, according to the decisions of the Supreme Court of Georgia theretofore made, represent fixed property, such as railroads, which properties were taxed where located, were not within the eye of the law property for taxation.

> *Wright, Comptroller-General, vs. Southwestern R. R.*,
> 64 Ga. 792, 799.

Had the purpose been otherwise the Act would have read that "personal property shall be construed," etc., to include, etc., "all stocks and securities in corporations in other States owned by citizens of this State,"—but is expressly declined to thus discriminate.

Second. The Act in question furnishes evidence that it did not propose to include all stocks, and to change the ruling made in 64 Ga., above quoted, but merely to reach such stocks as do not fall within the class described in such decision.

The same Act in section 1st thereof, in specifying the property to be enumerated to the Tax-Receiver, says:

> "The amount of capital invested in stocks of companies
> "other than such companies as are required to be returned
> "by the president or other agents, either to the Tax-
> "Receiver or the Comptroller-General."
>
> *Acts of* 1884-5, *pp.* 29, 29.

Third. We insist that the true significance of this Act was

simply to reach stocks not falling within the class described in 61 Ga. This is shown by applying the familiar rule of construing Sections 1 and 2 of the Act, so as to harmony and not in conflict.

It is further made manifest by the fact that the law also immediately succeeding this, to wit: those passed in the years 1888, 1890, *et seq.*, containing the following enumeration as to stocks which should be assessed, to wit:

> "stocks of non-resident companies or corporations, or of
> "companies or corporations in this State, whose capital
> "stock is not assessed by the president of such company
> "or corporation."
>
> *Georgia Acts of* 1888, pp. 55, 56.
> *Georgia Acts of* 1890, p. 65.

The words "capital stock," in this connection have been defined by the Supreme Court to mean the property of the corporation which represents the capital stock.

> 84 Ga. 572; 89 Ga. 695.

Unless this Act signifies what we have insisted, it would prove too much for the appellant. It would prove that all stocks, whether in corporations within or without the State, are taxable. Unless the Legislature can recognize that stock in the corporation is not separate property, but a mere evidence of title to the property held by the corporation, and already taxed in its hands, it can not exempt. If it does recognize that fact, then railroad shares of a corporation whose property exists in Alabama are not the representative of property in Georgia, and Georgia having declared that railroad shares are representative merely, is in no position, while asserting the non-taxability of shares in her own railroads, to insist upon taxing the same representative of property located beyond her borders.

6th. If this law had any such meaning (which we deny), it is no longer the law of Georgia, and its repeal has been recognized.

In 1895 the Legislature of Georgia adopted a new Code. This Code was compiled under authority of an Act of the Legislature, to be found in the Preface of the 1st volume of the Code of Georgia of 1895, page xx., which provided that

> "It shall be the duty and power of the Code Commis-

"sioners to codify and arrange in condensed form the "laws now in force in Georgia, from whatever source "derived."

After this Code was prepared, it was adopted by an Act of the Legislature, to be found in the same Preface, page xix., by which the said Code so prepared was adopted and made of force as the Code of Georgia.

This Code does not contain the 2d section of the Act of 1884-5, quoted by counsel for Appellant. It does contain the 1st section and the 3d section, which, as amended by a subsequent Act, are to be found in Volume 1, sections 833 and 834 of the Code.

Its omission is significant. It was not an oversight, as the codifiers had their attention upon the Act.

Learned counsel say in their supplemental brief that it is in substance in the Code, and that if not in the Code it is still the law.

We think it is *in substance* in the Code. We think that it did not change the former law, and was recognized by the codifiers as not changing the previous law laid down by the Supreme Court, distinguishing what stock was returnable for taxation, but as merely directing attention to the return of stock, for fear lest such stocks as were taxable, *as not representing fixed properties returned for taxation*, might be omitted, and that the codifiers did not consider it necessary to encumber the Code with it.

If this is not the case, then in so far as this section of the Act of 1884-5 changed the pre-existing law, the codifiers evidently considered it in conflict with subsequent legislation, and omitted it, and the Legislature adopted the Code with the 1st and 3d sections of the Act of 1884-5, and the 2d section left out.

Counsel for Appellant have quoted authority to the effect that law omitted from the Code, but not inconsistent therewith, is not repealed by the adoption of the Code.

The original Code of 1863 contained an express provision that such law should still remain of force, and such a provision was continued in the Code of Georgia for many years. It is noteworthy that no such provision is to be found in the Code of 1895, or in the Constitution of the State of Georgia, declaring what laws are of force in the State.

Code of Ga., 1895, Vol. I., Sec. 1.

Code of Ga., 1895, Vol. II., Sec. 5932.

But conceding that such is still the rule, the deliberate omission of a section of an act from the Code is certainly high evidence that it was either not considered to be the law when the Code was adopted, or that its provisions did not alter or add to the law as defined in other sections of the Code.

Mitchell vs. Railway Co., 111 *Ga.* 768, 769, 770.

5th. That none of the sections of the Code quoted as substantially embodying this second section of the Act of 1884-5 have any bearing whatever upon the question presented in this case, is evidenced by a very short analysis of them.

Section 833, Vol. I. of the Code, is merely the codification of certain questions relating to tax-payers, and is drawn from section 1st of the Act of 1884-5, page 28 (margin page 8 being a misprint), as amended by the Act of 1886. It clearly can not be considered as codifying the 2d section of the Act of 1884-5, when it expressly codifies the 1st section of the Act, and the amendment to said 1st section alone.

Section 2165, of Vol. II. of the Civil Code, has no bearing whatever upon the question of whether stock in a foreign corporation is taxable property, nor can it be a codification of the 2d section of the Act of 1884-5, for the reason that it is a part of the general law for the incorporation of railroads in Georgia, enacted by the Legislature in 1892, and provides that shares of stock in railroads located in Georgia, chartered under her general law, shall be personal property. Nobody contends that the Legislature of Georgia ever intended attempting to make such shares taxable property where she collects a tax upon the railroads located in her midst. It is also a mere repetition of Code, Section 3070.

Section 3070, of Vol. II. of the Civil Code, can not aid the question, as it is a section of the law which was in the original Code of 1863, and was in existence just as it now stands when the Supreme Court held in the case of *Wright, Comptroller-General, vs. Southwestern Railroad*, 64 *Ga.* 799, that stock in a railroad located out of the State was not property within the State of Georgia subject to taxation.

We conclude, upon the whole, that this Act does not aid in

any way in the elucidation of the question presented in this case; that it does not indicate what stocks were taxable, nor does it intend to change the law laid down by the Supreme Court of Georgia, that stocks representing fixed properties, where such properties are already taxed, are not property subject to be taxed.

7th. Respondent further shows that by the law of Alabama shares of railroad stock are situated in that State, and are personal property located there.

When a State gives *situs* to shares of stock, that place and not the residence of the owner is their location.

Jellenik vs. Huron Copper Mining Co., 177 *U. S.* 1.

The law of Alabama has the same provisions as to levy and sale upon shares of stock as are contained in the laws of Michigan in the case last above cited. Such stock may be attached or levied on under execution, by notification to the officer in charge of the books of transfer, and may be made in the county in which the corporation has its principal office or place of business.

Code of Alabama of 1896, *Sec.* 1265.

An administrator may be appointed for a non-resident in the county of the residence of a corporation in which his intestate owned stock, upon the theory that the property is located in such county.

Winter vs. London, 99 *Alabama*, 263.

These shares, therefore, if distinct property are property out of the State of Georgia, and not taxable by her.

8th. This case is not one of great magnitude, or involving the *collection* of the State's revenue in any great degree.

For nearly twenty years no effort was made to collect taxes on these shares.

The taxes due by Complainants and their lessor for 1900 were duly returned, the return accepted and the taxes paid, such return following the unbroken practice.

In May, 1901, the Comptroller-General demands taxes for 1900 on these shares, the accustomed taxes having been previously paid.

So that this is not the case of a question involving a stoppage of the State's fiscal system.

It is true that $150,000 is involved in *back taxes*,—but if obtained it will be a sort of *pick-up* for the State.

9th. It is not a case involving any wide application. It does not appear that any effort except to tax this Western Railway stock exists. (*Transcript, pp.* 14, 22.)

10th. It is not a case that commends itself. Two Georgia corporations, the Georgia Railroad & Banking Company and the Central Railroad & Banking Company, by permission of her laws acquired as tenants in common this railroad located in Alabama. It was taxable as such property where located.

For several years they ran it as tenants in common.

The Georgia Railroad & Banking Company leased its one-half interests to lessees. In 1882 these two owners obtained from Alabama a charter, and conveyed this road to this corporation, and equally held its stock. The Georgia Railroad & Banking Company turned over the control of the stock received by it under the lease to the lessees.

For years the taxes were paid as before on the property.

Georgia made no effort to claim any taxes on the stock.

Now, at this late day, her tax-gatherer attempts to claim back taxes on the ground that he has mistaken the law for years, and that the decision of her Supreme Court, rendered in 1880, has ceased to be law, although never overruled or drawn in question.

11th. Respondents also show as cause why this *writ of certiorari* should not be granted the reasons assigned and authorities cited in the briefs filed by counsel for Appellee in the Circuit Court of Appeals, which are herewith submitted as a part of this response.

JOS. B. & BRYAN CUMMING,
KING, SPALDING & LITTLE,
Solicitors for Respondents.

JOS. B. CUMMING,
ALEX. C. KING,
Of Counsel.